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No. 81-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, WARDEN,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
PAUL D. KAMENAR
NICHOLAS E. CALIO
1612 K Street, N.W., Suite 502
Washington, D.C. 20006
(202) 857-0240
Attorneys for Amicus Curiae, Washington Legal Foundation

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QUESTION PRESENTED

Whether a death penalty imposed pursuant to a constitutional statute on the basis of a plurality of aggravating circumstances, each of which has been individually established beyond a reasonable doubt and stated in writing by the jury, must be set aside because one such circumstance is subsequently determined to be unconstitutional?

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a non-profit corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the establishment of a Crime Victims Program.

This program is designed to advance the rights of crime victims and to help reduce the alarming crime rate in America. Among other activities, WLF provides educational materials, legal guidance, and assistance to the victims of violent crime, participates in rulemaking proceedings before agencies such as the United States Parole Commission, and monitors criminal cases in which the courts have been too lenient in sentencing violent criminals or otherwise exhibited an insensitivity to the rights of victims and the general public.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging that this Court consider the right and the need of the States to protect their law-abiding citizens from murders and other acts of extreme violence. The Foundation believes that the States must be permitted without undue interference from Federal Courts to establish guidelines and carry out capital sentences within the meaning of the Eighth and Fourteenth Amendments of the Constitution. WLF is committed to insuring that the public interest arguments in favor of capital punishment are advanced before this Court as frequently as are those against it.

The Washington Legal Foundation has appeared before this Court as *amicus curiae* on numerous occasions. Briefs *amicus curiae* have been filed with and accepted by the Supreme Court in the following recent cases: *Eddings v. Oklahoma*, No. 80-5727, brief filed August 12, 1981); *Edwards v. United States*, No. 81-5017 (brief filed September 2, 1981); *Williams v. Zbaraz*, 448 U.S. 358, 100 S.Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 447 U.S. 530, 100 S.Ct. 2326 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuels Company v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 322 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323 (1979); *Federal Trade Commission v. Standard*

Oil Co. of California, 449 U.S. 232, 101 S.Ct. 62 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, —— U.S. ——, 101 S.Ct. 1287 (1981); *Rostker v. Goldberg*, —— U.S. ——, 101 S.Ct. 2646 (1981); *Moody v. Forresster*, —— U.S. ——, 101 S.Ct. 1733 (1981); *First National Maintenance Corp v. NLRB*, —— U.S. ——, 101 S.Ct. 1510 (1981).

WLF can bring to this case a perspective not presently represented which may assist in obtaining full consideration of the public interest issues. While the Washington Legal Foundation appreciates the difficult nature of this Court's task in capital cases, the time has come to speak bluntly. Legislatures reflect the will of the public; juries embody the conscience of the community. Both have spoken on capital punishment. Too often, all that stands in the way of carrying out the common weal are the actions of various Federal courts. While this Court has not seen fit to abolish capital punishment, it has seen fit to sabotage its imposition by virtue of constant reinterpretation and refinement of the applicable principles. The resultant confusion undermines the rightful authority of the States to protect the general welfare and the confidence of the public in its government and criminal justice system.

STATEMENT OF THE CASE

Amicus Curiae, Washington Legal Foundation believes that the background to the instant case is best examined in two parts: the factual background leading to Petitioner's conviction and sentence and the procedural background leading Respondent to this Court. The purpose of this organizational framework is to highlight the points which are often lost in cases such as this, but which should be foremost in this Court's mind as it reaches its decision—the heinous nature of the crime committed, the right of law-abiding citizens to be protected by their government, and the myriad procedural protections already afforded the criminal.

A. *Factual Background of Conviction and Sentence*

Respondent, Alpha Otis O'Daniel Stephens, was convicted of murder and sentenced to death by a jury of the State of Georgia for the 1974 murder of Mr. Roy Asbell. One year prior to murdering Roy Asbell, Respondent had committed a murder, an armed robbery, and four burglaries. He escaped from the Houston County, Georgia jail on August 19, 1974, where he was serving concurrent sentences for the multiple burglary convictions.

Respondent had already committed an armed robbery and a burglary after his escape when he broke into the home of Charles Asbell on August 21, 1974. Respondent located a .357 magnum pistol inside the house which he loaded and placed, along with various other weapons, in a 1972 Dodge he had stolen.

Charles Asbell was not at home at the time of the break-in. However, Charles Asbell's father, Roy, drove up to his son's house as Respondent was preparing to leave the scene of the burglary. Roy Asbell asked Stephens what he had been doing in the house. After seeing the guns in Stephens' car, Roy Asbell pulled out a derringer. Respondent, who is 6 feet, 2 inches tall, ran to Roy Asbell's truck, dragged him out at gunpoint, and hit him in the face several times. Roy Asbell, who was 5 feet, 6 inches tall and crippled as a result of a tractor accident at the time, begged petitioner not to hit him any more. Mr. Asbell, who usually carried several hundred dollars, offered Stephens money in exchange for his life. Respondent took Roy Asbell's money and kicked and pistol-whipped him again causing a broken jaw and several skull fractures.

Stephens commandeered Roy Asbell's truck and drove him three miles to a pasture where Respondent stopped the truck. Roy Asbell tried to escape with his life by hobbling across the field to an abandoned building being

used as a barn. Respondent chased him, however, and after taking more money from Roy Asbell, Respondent placed the .357 magnum in his ear and fired twice. Both bullets passed through Mr. Asbell's skull and blew off the top of his head. Stephens had finally killed him.

The murderer was apprehended the next day and was eventually convicted of murder, among other crimes, and sentenced to die under the Georgia capital statute previously adjudged constitutional by this Court. *Gregg v. Georgia*, 428 U.S. 153 (1976).

B. *Procedural Background*

At trial, the judge permitted the jury to consider four statutory aggravating circumstances:

(1) Respondent had a prior record of conviction for a capital felony, Ga. Code Ann. 27-2534.1(b)(1);

(2) Respondent had a substantial history of *serious assaultive convictions*, Ga. Code Ann. § 27-2534.1 (b)(1);

(3) Respondent was on escape when he committed the murder, Ga. Code Ann. § 27-2534.1(b)(9); and

(4) the offense was outrageously or wantonly vile, horrible or inhuman, Ga. Code Ann. § 27-2534.1 (b)(7).

The jury determined that the first three aggravating circumstances were individually supported by the evidence. However, it determined that the evidence did not support the existence of the fourth specified circumstance beyond a reasonable doubt. *Stephens v. Zant*, 631 F. 2d 397, 405 (5th Cir. 1980).

Stephens appealed his conviction and sentence directly to the Georgia Supreme Court. Before his appeal was final, the Georgia Supreme Court held that the portion of Ga. Code Ann. § 27-2534.1(b)(1), which allows the

death penalty where "a murder is committed by a person with a substantial history of assaultive convictions," was unconstitutional. *Arnold v. State*, 236 Ga. 534, 542, 224, S.E. 2d 386 (1976). Nevertheless, the Georgia Supreme Court upheld Respondent's death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. *Stephens v. State*, 237 Ga. 259, 261-62, 227 S.E. 2d 261, 263 (1976). This Court denied Stephens' petition for certiorari. *Stephens v. State* 429 U.S. 986 (1976).

The murderer filed a State habeas corpus petition and again alleged that jury's consideration of an aggravating circumstance later held to be unconstitutional required overturning his sentence. The Georgia Supreme Court again upheld Respondent's sentence, *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E. 2d 92 (1978), and this Court again denied Respondent's subsequent petition for writ of certiorari. 439 U.S. 991 (1978).

Respondent began his case anew with a writ of habeas corpus to the Federal District Court alleging the same constitutional flaw he had already litigated and lost in his State appeal and habeas corpus proceeding. The District Court of the Middle District of Georgia denied Federal habeas corpus relief. *Stephens v. Zant*, 79-30-MAC (M.D. Ga. May 11, 1979). However, Roy Asbell's murderer finally found a willing ear on his seventh try when the Fifth Circuit Court of Appeals vacated his death sentence. *Stephens v. Zant*, 631 F. 2d 397 (5th Cir. 1980).

This Court granted certiorari limited to a single question: "[w]hen the death sentence is imposed on basis of plurality of aggravating circumstances, each of which has been established beyond reasonable doubt, must death sentence be set aside because one aggravating circumstance is set aside?" 50 U.S.L.W. 3212 (October 6, 1981).

SUMMARY OF ARGUMENT

Respondent's argument that his death sentence is unconstitutional simply because one of a plurality of aggravating circumstances found by the jury was subsequently set aside lacks merit. Respondent's death sentence was imposed pursuant to a constitutional statute which provides that the presence of a single aggravating circumstance justifies the imposition of a capital sentence. In Respondent's case, the jury found that three such circumstances were independently supported beyond a reasonable doubt by the evidence. Moreover, the record of the instant case provides this Court positive evidence by which to determine the specific grounds for the jury's verdict. The same record demonstrates that the sentence imposed by the jury resulted from a clearly-channeled, rationally reviewable exercise of discretion. Hence, the ruling of the Fifth Circuit Court of Appeals must be reversed.

Public policy considerations also dictate that Respondent's sentence be reinstated by this Court. Through the legislatures which reflect its will and the juries which reflect its conscience, society has mandated that capital punishment be imposed for a certain class of crimes by which it is particularly revulsed. The persistent, *ex cathedra* interference of an all-knowing, over-arching Federal judiciary which constantly expands and tinkers with the procedural protections afforded to capital defendants interferes with the right of the States to protect their citizens and frustrates the ends of justice. Hence, the public interest requires that the State of Georgia be permitted to punish Respondent Stephens for the brutal murder of Roy Asbell.

ARGUMENT

I. THIS COURT NEED NOT SET ASIDE A DEATH PENALTY IMPOSED PURSUANT TO A CONSTITUTIONAL STATUTE ON THE BASIS OF A PLURALITY OF AGGRAVATING CIRCUMSTANCES SOLELY BECAUSE ONE SUCH CIRCUMSTANCE IS SUBSEQUENTLY FOUND TO BE UNCONSTITUTIONAL.

The Fifth Circuit Court of Appeals erroneously overturned the death penalty of Respondent Alpha Otis O'Daniel Stephens. Stephens' death sentence was imposed pursuant to a constitutional statute on the basis of a plurality of aggravating circumstances, each of which was individually determined to exist beyond a reasonable doubt. Hence, the murderer's sentence need not be declared unconstitutional simply because one such circumstance was subsequently set aside. The cases relied upon by the United States Court of Appeals for the Fifth Circuit in reaching its decision are distinguishable in fact and principle from the one at bar. The record in Respondent's case provides this Court positive evidence by which to determine the specific grounds for the jury's decision. In addition, the jury's decision to impose a capital sentence resulted from a rationally reviewable, clearly-channeled exercise of discretion which starkly contrasts to the wandering, speculative exercise of judicial review by the Fifth Circuit. Therefore, the Washington Legal Foundation submits that this Court must reverse the ruling of the Court below and reinstate the verdict of the Georgia jury against Respondent.

A. The Jury's Decision to Impose a Capital Penalty in the Instant Case, Explicitly Based as it Is on Several Aggravating Circumstances Individually Established Beyond a Reasonable Doubt, Passes Constitutional Muster.

The jury's imposition of the death sentence on Respondent Stephens does not violate his constitutional rights. While one of the statutory aggravating circum-

stances found by the jury was later deemed unconstitutional, the Supreme Court of Georgia has repeatedly held that a death penalty imposed on the basis of a plurality of aggravating circumstances will not be set aside merely because one of the aggravating circumstances is later deemed infirm. *Stevens v. State*, 247 Ga. 698, 278 S.E. 2d 398 (1981), *cert. denied*, 449 U.S. 891 (1981); *Hamilton v. State*, 246 Ga. 264 n. 1, 271 S.E. 2d 173 (1980), *cert. denied*, —— U.S. —— (1981); *Brooks v. State*, 246 Ga. 262, 263, 271 S.E. 2d 172 (1980), *cert. denied*, —— U.S. —— (1980); *Burger v. State*, 245 Ga. 458, 460-61, 265 S.E. 2d 797 (1980), *cert. denied*, 446 U.S. 988 (1980); *Gates v. State*, 244 Ga. 587, 599, 261 S.E. 2d 349 (1979), *cert. denied*, 445 U.S. 938 (1980); *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E. 2d 92 (1978), *cert. denied*, 439 U.S. 991 (1978); *Stephens v. State*, 237 Ga. 259, 261-62, 227 S.E. 2d 261 (1976), *cert. denied*, 429 U.S. 986 (1977).* Rather, the Georgia Court has determined that the existence of other independently supported aggravating circumstances justifies affirmance of a capital sentence and at least two members of this court have indicated agreement with that position. *See Westbrook v. Balkcom*, —— U.S. ——, 101 S. Ct. 541, 543, 66 L. Ed. 2d. 298 (1980) (Stevens, J., concurring in denial of certiorari); *Id.* at 66 L. Ed 2d 299 (White, J., dissenting from denial of certiorari).

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* A number of other State courts have reached a similar conclusion. *See State v. Monroe*, 397 So. 2d 1258, 1274-76 (La. 1981); *State v. Sonnier*, —— So. 2d —— (La. 1981) (#81-K-1846); *State v. Clark*, 126 Ariz. 428, 616 P. 2d 888, 895-97 (Ariz. banc 1980), *cert. denied*, 449 U.S. 1067 (1980); *State v. Rust*, 197 Neb. 528, 250 N.W. 2d 867, 872-76 (1977), *cert. denied*, 434 U.S. 912 (1977); *State v. Mercer*, 618 S.W. 2d 1, 10 (Mo. banc 1981), *cert. denied*, —— U.S. ——, 51 U.S.L.W. 3279 (Oct. 13, 1981); *Brown v. State*, 381 So. 2d 690, 696 (Fla. 1980), *cert. denied*, 449 U.S. 1118 (1981); *Contra., Bufford v. State*, 283 So. 2d 1162, 1174 (Ala. Ct. Crim. App. 1980); *Hopkinson v. State*, 632 P. 2d 79, 171-72 (Wyo. 1981).

Similarly, no decision of this Court advanced by Respondent requires that his sentence be vacated. While the Fifth Circuit admitted in the face of the well-settled Georgia law that "no uncertainty" existed as to the two valid aggravating circumstances and either "by itself would be legally sufficient to permit the jury to impose the death penalty," *Stephens v. Zant*, 631 F. 2d 397, 406 (5th Cir. 1980), the court nevertheless vacated Stephens' sentence. In reaching its remarkable decision, the court relied primarily on the authority of *Stromberg v. California*, 283 U.S. 359 (1931); *accord*, *Bachellar v. Maryland*, 397 U.S. 564 (1970); *Street v. New York*, 394 U.S. 576 (1969); *Yates v. United States*, 354 U.S. 298 (1957), and on the generalized pronouncements of principle by this Court in previous capital cases. *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S. 280 (1972) (opinion of Stewart, Powell and Stevens, JJ); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977). However, an examination of the lower court's opinion and the cases cited therein demonstrates that the Fifth Circuit misinterpreted case law and speculated on the jury's thought processes at the expense of a wealth of objective evidence supporting the constitutionality of Stephens' sentence, as well as at the expense of the public interest.

Even a superficial examination of *Stromberg* and its progeny, all of which dealt with general verdicts of guilty on multicount indictments, highlights their factual and substantive differences from the case at bar. In *Stromberg*, *supra*, the defendant was convicted by a jury under a California statute which made it an offense to publicly display a red flag for any one of three purposes. This Court ruled that punishing an individual for the first named purpose would be unconstitutional and rejected the State court's reasoning that the conviction could be sustained because the other two statutory grounds were severable and constitutional. The Court stated that:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested . . . . [I]t is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under the [unconstitutional] clause. 283 U.S. at 367-68.

Accord, Bachellar, supra, at 570-71; *Street, supra,* at 585-88; *Yates, supra,* at 311-12. *See also, Williams v. North Carolina,* 317 U.S. 287 (1942).

Whatever force the *Stromberg* principle has in the context of the instant case derives solely from its generality. This Court has stated in reference to situations similar to the one at bar that:

> There is no comparable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of those counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others. *Street v. New York,* 394 U.S. at 588 (footnote omitted).

Here, the penalty verdict from Respondent's sentencing trial is not a general verdict of guilt or innocence like that at issue in *Stromberg;* it is a specialized sentencing verdict which states that a number of aggravating circumstances independently existed in Respondent's murder of Roy Asbell. *See Westbrook v. Balkcom, supra,* 66 L.Ed.2d at 299 (White, J., concurring in denial of certiorari). A closer comparison of *Stromberg* and the case at bar underscores the differences.

The *Stromberg* jury was told that if defendant committed any one of three acts, he could be found guilty. The jury's verdict in that case stated no more than that defendant was guilty—a verdict which made it impossible to discern the act or acts upon which it was based. In the instant case, however, Stephens' guilt had already

been determined and the jury was instructed for sentencing purposes to consider, *inter alia*, the existence of four disjunctively stated aggravating circumstances. These aggravating circumstances were provided to the jury both orally and in writing with instructions that if sentencing was fixed at death the jury must:

> . . . designate in writing . . . the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment at death . . . you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt.

Unlike the *Stromberg* jury, the triers of fact below did not simply provide a general sentencing verdict of death. Rather, it specified in writing the existence, beyond a reasonable doubt, of no less than three aggravating circumstances, any of which is sufficient standing alone to justify Respondent's sentence. The jury's rejection of the fourth aggravating circumstance alleged by the State of Georgia buttresses the conclusion that it considered and decided each circumstance separately. Thus, the principle announced in *Stromberg* and related cases is without constitutional effect here and the subsequent determination that one of the plurality of aggravating circumstances was constitutionally infirm does not affect the validity of Stephens' sentence.

B. Respondent's Death Sentence Resulted From a Clearly-Channeled, Rationally Reviewable Exercise of Discretion by the Jury Which Cannot Be Overturned on the Basis of Speculation by the Fifth Circuit.

The Court of Appeals also erred in holding that:

> The jury's discretion here was not sufficiently channeled . . . , and that the process in which the death

> penalty was imposed in this case was not "rationally reviewable." *Stephens*, 631 F.2d at 406. (citations omitted).

In the years since *Furman v. Georgia*, *supra*, this Court has largely focused its efforts and, as a result, those of the States on channeling the jury's discretion in order to insure rational, consistent sentencing in capital cases. *See, e.g., Gregg, supra*, 428 U.S. at 188-89; *Woodson, supra*, 428 U.S. at 304; *Lockett v. Ohio*, 438 U.S. 586, 601 (1978); *Jurek v. Texas*, 428 U.S. 262, 276 (1978). No question exists that all of the procedural requirements mandated by this Court's previous decisions were met in the instant case. Thus, it is particularly troubling that the Fifth Circuit Court of Appeals chose to usurp the function of the Georgia jury and speculate in hindsight on the nature and path of the jury's deliberations.

According to the procedures embodied in Georgia's capital punishment statute, Respondent's jury was instructed to consider all facts presented in extenuation and mitigation of his crime. The jury was also instructed that it could consider the existence of four statutory aggravating circumstances; that it had to find in writing "one or more" of those circumstances existed "beyond a reasonable doubt" or punishment could not be fixed at death; and that a recommendation of mercy would result in life imprisonment.

The jury specified in writing that three statutory aggravating circumstances existed beyond a reasonable doubt and that a fourth did not. *Amicus* submits that the very exercise of stating in writing the existence of independent aggravating circumstances drains all color from Respondent's argument and the Fifth Circuit's holding.

Following the jury's decision, the Georgia Supreme Court considered as part of its statutorily mandated review whether Stephens' sentence was influenced by passion, prejudice, or any other arbitrary factor. The court

also considered whether the evidence supported the finding of three statutory aggravating circumstances. The Georgia Supreme Court affirmed Respondent's sentence based upon all the evidence at trial. That evidence, which is undisputed, shows that Respondent was on escape at the time he brtually murdered Roy Asbell, see Ga. Code Ann. § 27-2534.1(b)(1), and that he had five capital felony convictions before he was convicted of the murder of Roy Asbell, see Ga. Code Ann. § 27-2534.1(b)(9). Either finding justifies the jury's verdict. Thus, the record in the instant case presents positive evidence by which this Court can pinpoint, as did every other court reviewing Respondent's case but the Fifth Circuit, the constitutionally valid grounds upon which the jury imposed its sentence.

The conclusion that the Fifth Circuit's decision must be reversed is reinforced by a brief examination of the lower court's reasoning. Originally, the Court of Appeals predicated its ruling that the sentencing process was not "rationally reviewable" on the ground that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it." *Stephens v. Zant*, *supra*, 631 F.2d at 406. However, the ground of decision is clearly erroneous. Georgia law expressly provides that any prior criminal convictions, or lack of the same, are admissible in evidence at the sentencing hearing. *See Ga. Code Ann.* § 27-2503(a); *see also*, *Stephens v. Hopper*, *supra*, 247 S.E.2d 829 (1977). Thus, the Fifth Circuit's speculation on the effects of these prior convictions, which was tenuous and misdirected to begin with, becomes meaningless in light of the applicable State law.

The lower court's response to an explication of Georgia law in the State's motion for rehearing is similarly unacceptable. In its modified opinion, the court merely

refines its rationale and contends, without any citation to legal authority, that the presence of the vague aggravating circumstance "may have unduly directed the jury's attention to [Respondent's] prior convictions." *Stephens v. Zant*, 648 F.2d 446 (5th Cir. 1981). With all due respect, the Court of Appeals' conjectural musings on the thought processes of the jury far exceed any legitimate scope of review. It is not the role of judges to divine how a jury may have been influenced when all objective evidence indicates that it made a reasoned, cautious decision. As previously noted, Stephens' jury exercised its discretion in a clearly-channeled manner and the entire review process comported with the constitutional mandates of this Court. Therefore, the Washington Legal Foundation submits that the isolated statement of constitutional principles and speculation of the Fifth Circuit Court of Appeals cannot be allowed to undermine that process.

II. PUBLIC INTEREST CONSIDERATIONS DICTATE THAT THIS COURT REINSTATE THE DEATH PENALTY FOR ROY ASBELL'S MURDERER.

Amicus curiae Washington Legal Foundation submits that sound public interest considerations dictate the reinstatement of Respondent's death penalty for the brutal murder of Roy Asbell. While few, if any, members of our society view the imposition of the death penalty lightly, this Court has recognized that "the death penalty has been employed throughout our history." *Trop v. Dulles*, 356 U.S. 86, 99 (1958). This Court has also acknowledged that ". . . in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people," *Furman, supra*, 408 U.S. at 383 (Burger, C.J., dissenting), or, stated somewhat differently, that "the value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with

the legislatures. . . ." *Gregg, supra*, 428 U.S. at 186-87. Moreover, this Court has also recognized that juries "express the conscience of the community on the ultimate question of life and death," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), and that "[t]he States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision . . . ." *McGautha v. California*, 402 U.S. 209 (1971).

With that predicate in mind, it is particularly telling that society, through the legislatures and juries that represent it, has spoken very clearly on capital punishment. Over 35 States have enacted death penalty statutes since this Court's decision in *Furman*. *See Eddings v. Oklahoma*, 616 P.2d 1159, 1167 (Okla. Cr. App. 1978); *Coleman, supra*, 68 L.Ed.2d at 339. Similarly, public opinion surveys demonstrate society's support for capital punishment. In 1966, a poll found that 42 percent of those polled favored capital punishment while 11 percent had no opinion and 47 percent opposed it. A 1969 poll, however, indicated 51 percent in favor, 9 percent with no opinion, and 40 percent opposed. Erskine, *The Polls: Capital Punishment*, 34 Public Opinion Quarterly 290 (1970). By 1973, 59 percent favored the death penalty with 31 percent opposed, while by 1977, 67 percent were in favor and only 25 percent opposed. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS at 199 (1980). This year a *Time* magazine poll indicated that 73 percent of the American public supported the imposition of the death penalty. *Time*, June 1, 1981 at 13, col. 3. The public support of capital punishment is clearly a function of the alarming crime rate in this country and a strong desire for punishment, deterrence, and retribution. While the public supports capital punishment and juries are

imposing death sentences with increasing frequency, their verdicts are rarely carried out. Since capital punishment was legalized again in 1976, 891 murderers were sent to death row; only four have been executed. *Newsweek*, November 16, 1981 at 102, col. 1.

The reasons are not hard to find. This Court once stated that:

> Our function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. *McGautha, supra*, at 195.

However, an examination on this Court's capital punishment decisions over the last decade illustrates that, in effect, it has imposed a constantly changing "better system" on the States.

McGautha, the last death penalty case decided by a majority of the Court, held that the Constitution did not "guarantee trial procedures that are the best of all worlds." 402 U.S. at 221. Little more than a year later, however, this Court began to speak with many voices in the Babelesque *Furman* decision which initiated the search for the "perfect" system. *Furman* sowed legislative and judicial confusion which *Gregg, supra*, and its companion cases attempted to rectify four years later.

The *Gregg* line of cases did not end the process, however. In the five years since those decisions, this Court has repeatedly modified its views on the constitutional requirements for imposing capital punishment. *See Coker v. Georgia*, 433 U.S. 584 (1977); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Green v. Georgia*, 442 U.S. 95 (1979); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Beck v. Alabama*, 447 U.S. 625 (1980); *Estelle v. Smith*, —— U.S. ——, 101 S. Ct. 1866, 68 L.Ed.2d 359 (1981); *Bullington v. Missouri*, —— U.S. ——, 101 S. Ct. 1852, 68 L.Ed.2d 270 (1981). This "[constant] tinkering with the principles laid down in the five death penalty cases

decided in 1976," has wrapped a veil of "due process" over an ever-expanding list of capital sentencing procedure issues. *Coleman, supra,* 68 L.Ed.2d at 339 (Rehnquist, dissenting from denial of certiorari). These decisions have led one member of this Court to question whether "we have mistakenly sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs." *Id.* Indeed, one lower court judge has wondered whether "the Court is in the process of hedging this penalty about with such obstacles that, as a practical matter, it cannot be carried out." *Gibson v. Jackson,* 578 F.2d 1045, 1057 (5th Cir. 1978) (Gee, Circuit Judge, specially concurring).

The repeated statements that capital punishment is constitutional have begun to have a hollow ring as a practical matter. While the inmate population on death row continues to rise as a result of jury determinations that a restricted number of crimes must be punished by death, few executions are ever carried out and none are conducted within a reasonable time.

Amicus submits that we cannot continue to steep capital defendants in unduly expansive procedural protections. At some point, it must be acknowledged that the tortuous procedural path of capital cases does more to *undermine* the criminal justice system and society's confidence in it than it does to protect the rights of those who have killed fellow human beings. *Amicus* does not object to reasonable procedural protections in our criminal justice system. However, the Washington Legal Foundation does question the efficacy and necessity of the long list of protections now afforded to capital defendants.

A murderer may effectively challenge and re-challenge his death sentence on the same grounds again and again. As stated recently: "They can make these appeals in two

state courts and, starting fresh, through the Federal system up to the Supreme Court." *Newsweek*, "The Mistress of Delay," November 16, 1981 at 102-03. Respondent Stephens' case is a typical example. His conviction and sentence were reviewed and affirmed by the Georgia Supreme Court. This Court denied certiorari. His State *habeas corpus* petition was reviewed and denied by the high court in Georgia and certiorari was denied by this Court. The Federal District Court denied his Federal *habeas corpus* petition until finally, in his seventh "bite at the apple" Respondent found a "court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error." *Coleman, supra*, 68 L.Ed.2d at 338.

The Washington Legal Foundation believes that "the [respondent has] had fair trial and fair review. The people of the State are also entitled to due process of law." *Stein v. New York*, 346 U.S. 156, 197 (1953). The State of Georgia, and the other States, must be allowed to effect the punishment and deterrence of crime as they see fit within the meaning of this Court's previous decisions. For those who argue that the imposition of the death penalty has not been an effective deterrent, *amicus* submits that if that is so, it is because of the continued delays in carrying out the sentence that has weakened its deterrent effect. As it now stands, the criminal element can laugh at the death penalty knowing that a sympathetic judge will invariably be found to thwart the will of the people. This Court must finally put a stop to the mockery made in recent years of society's right to express its revulsion for particular crimes through its criminal justice system. *Amicus* submits that this Court cannot allow justice to be frustrated again. The time has come for this Court to signal that law-abiding members of society, as well as criminals, have rights which deserve protection.

CONCLUSION

The essence of the United States constitutional plan is to recognize that sovereign power is divided between a Federal Government and State Governments and that the definition, detection, and prosecution of crime is primarily a matter of local concern. The Washington Legal Foundation submits that the sentencing of Respondent was a matter of local concern carried out well within the strictures of the Federal Constitution. The State of Georgia has the right on behalf of its citizens to administer that sentence without the continued interference from an overreaching Federal Judiciary.

Respectfully submitted,

DANIEL J. POPEO
General Counsel

PAUL D. KAMENAR
Director of Litigation

NICHOLAS E. CALIO
Litigation Counsel

WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W., Suite 502
Washington, D.C. 20006
(202) 857-0240

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